

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-150114-001 DT

06/14/2016

HON. SAM J. MYERS

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA

KRISTIN LARISH

v.

FRANKLIN ARNETT CLIFTON (001)

MARIA L SCHAFFER
GREGORY J NAVAZO

CAPITAL CASE MANAGER

RULING / CAPITAL CASE

In a minute entry dated May 3, 2016, Judge Scott McCoy issued the following order:

IT IS ORDERED that the State shall provide to Judge Myers' office by 5 p.m. today the information, documents and/or other materials (the "materials") the State has sealed. The Special Master shall review the materials to determine whether any materials are: 1) attorney-client privileged; or 2) beyond the scope of the search warrant.

This Court subsequently received a manila envelope containing: (1) emails between the parties; (2) Search Warrant #SW2016-004465 with Affidavit, Return, and a two-page Incident Report #201401805865-000; and (3) a CD. The Court will direct the Clerk to mark the manila envelope with all contents as an exhibit to be admitted and filed under seal (exhibit 1).

Following the receipt of these materials, the Court unsuccessfully attempted to access the materials on the CD. Per the agreement of the parties, counsel for Defendant provided the Court with two binders containing hard copies of the cell phone extraction materials. At the request of the Court, one copy was marked with Defendant's proposed redactions, and one copy was unmarked. The Court will direct the Clerk to mark the unmarked binder as an exhibit to be admitted and filed under seal (exhibit 2).

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The Court has reviewed the materials provided by Defendant. Below, the Court has indicated as to each section of materials: (1) Defendant's position as to privileged contents and contents outside the scope of the warrant; and (2) the Court's ruling on privileged contents and contents outside the scope of the warrant.

CALENDAR.

Defendant's position: Four entries from 9/30/14 to 11/2014 can go to the state; all other entries are outside the time scope of the warrant.

THE COURT'S RULING: Four entries (#3, 4, 5, and 6) shall be disclosed to the state; all other entries are outside the time scope of the warrant.

CALL LOGS.

Defendant's position: Call #s: 1, 56, 57, 195, 267, 308 are attorney-client privilege and should not be disclosed to the state. Calls 2-189 (with the exception of calls 1, 56, 57 as mentioned above) should be disclosed to the state. All other calls after 189 should not be disclosed as they are not within the time scope of the warrant.

THE COURT'S RULING: In interpreting A.R.S. §13-4062, the Court finds that the existence of a communication (i.e. evidence that a call was made between attorney and client) is not privileged; the content of the communication is privileged (under certain circumstances). As a result, the Court does not find that a mere listing of a date/time of a call is not privileged and is discoverable by the State. Therefore, calls 1-189 shall be disclosed to the state. All other calls after 189 shall not be disclosed as they are not within the time scope of the warrant.

CHATS.

Defendant's position: None of the chats should be disclosed to the state as they were not specifically requested or named in the warrant. There are some chats relevant to the time period of October of 2014 and some material that appears to be downloaded to chats during October of 2014 but what was downloaded is not reflected in the extraction report. These are reflected on pages 9-11, 13, 23-24, 25, 28-29, 30-31, 33-34, 40-43. It is the defense's position that these items should not go the state.

THE COURT'S RULING: The warrant authorized seizure of "Short message service (SMS or text messages), Multimedia message service (MMS), and attached multimedia files, to include incoming, outgoing and drafts; Secondary Short message service (SMS or text messages) applications to include KIK, TextPlus, and other similar services." The Court finds that the

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information contained in the “Chats” section is covered by this authorization. Therefore, the following portions shall be disclosed to the state: pages 9-11 (all), 13 (bottom 6 entries), 19 (top entry only), 22 (top entry only), 23 (beginning halfway down page with first 10/1/2014 entry through page 26 (to the end of item 30 on page 26), 28 (beginning with first 10/5/2014 entry through end of item 1 on page 29), 30 (beginning with first 10/2/2014 entry through end of item 2 on page 31), 33 (final entry on page through end of item 3 on page 34), 40 (beginning with first 10/3/2014 entry through end of item 5 on page 42), 43 (beginning with first 10/3/2014 entry through end of item 12 on page 44).

CONTACTS.

Defendant’s position: None of the contacts should go to the state. They are not requested or named in the warrant.

THE COURT’S RULING: The warrant does not authorize seizure of contacts. This portion shall not be disclosed to the State.

COOKIES.

Defendant’s position: The warrant does request cookies. To that end, the state is entitled to all cookies that were created during the month of October 2014 which are reflected in pages 1-93 of this extraction report. Anything following those pages is not appropriate due to the time constraints of the warrant.

THE COURT’S RULING: Pages 1-93 (through entry 1287) shall be disclosed to the state; all other entries are outside the time scope of the warrant and shall not be disclosed.

GPS OR DEVICE LOCATION.

Defendant’s position: The warrant does request this information but is temporally limited; therefore, locations 1 thru 6 on page 1 should go to the state. All subsequent locations/data are outside the time scope for this warrant.

THE COURT’S RULING: Page 1 (entries 1-6) shall be disclosed to the state; all other entries are outside the time scope of the warrant and shall not be disclosed.

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EMAILS.

Defendant's position: The warrant does request this information but is temporally limited; therefore, e-mails 1-24 on pages 1-6 should be disclosed to the state. All other e-mails are time barred by the warrant.

THE COURT'S RULING: Pages 1-6 (e-mails 1-24) shall be disclosed to the state; all other entries are outside the time scope of the warrant and shall not be disclosed.

INSTALLED APPLICATIONS.

Defendant's position: The warrant does request this information but is temporally limited; therefore the state is entitled to information regarding installed app #1 on page one of the extraction report. All other information should be blocked by the time limits of the warrant.

THE COURT'S RULING: The warrant authorizes seizure of "apps on the device...for the time frame of October 2014". The Court finds that this covers all apps that were on the device (even if installed in a prior month) during October 2014. As each entry contains a "Purchase Date" and a "Deleted Date", all entries with a purchase date prior to November 1, 2014 and no deleted date are discoverable. Items that have no purchase date will not be discoverable as the Court cannot determine if they were on the device in October 2014. Therefore, items 1-32 shall be disclosed to the state; all other entries are potentially outside the time scope of the warrant and shall not be disclosed.

INSTANT MESSAGES.

Defendant's position: According to computer knowledgeable employees at the Office of the Legal Defender, all of the Instant Messages have been deleted and cannot be recovered for review.

THE COURT'S RULING: There is no interpretable data in this section; the Court will make no orders regarding Instant Messages at this time.

MMS MESSAGES.

Defendant's position: The warrant does list/request MMS Messages. The state is entitled to messages 1-445 on pages 1-216 extraction report. The subsequent messages beginning on p. 217 are time-barred by the warrant.

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THE COURT'S RULING: Pages 1-216 (messages 1-445) shall be disclosed to the state; all other entries are outside the time scope of the warrant and shall not be disclosed.

NOTIFICATIONS.

Defendant's position: The warrant did not list or request notifications. All of the notifications appear to relate to a Facebook account which is also not listed on the warrant. To that end, the defense does not believe these notifications should be disclosed to the state.

THE COURT'S RULING: The warrant authorized seizure of "Short message service (SMS or text messages), Multimedia message service (MMS), and attached multimedia files, to include incoming, outgoing and drafts; Secondary Short message service (SMS or text messages) applications to include KIK, TextPlus, and other similar services." The Court finds that the information contained in the "Notifications" section is covered by this authorization. Therefore, the following portions shall be disclosed to the state: pages 1-11.

PASSWORDS.

Defendant's position: The warrant does not list or request passwords; therefore, none of this information should be disclosed to the state.

THE COURT'S RULING: The warrant authorized seizure of "any account information , settings, and saved usage information for any and all installed applications..." The Court finds that the information contained in the "Passwords" section is covered by this authorization. Therefore, the following portions shall be disclosed to the state: pages 1-3.

POWERING EVENTS.

Defendant's position: No objection to the state receiving this information.

THE COURT'S RULING: Page 1 shall be disclosed to the state.

SEARCHED ITEMS.

Defendant's position: The warrant did list/request stored searches of the internet. To that end, the state is entitled to searches 1-24 in October of 2014. Subsequent searches are barred by the time limit in the warrant.

THE COURT'S RULING: Pages 1-3 (items 1-24) shall be disclosed to the state; all other entries are outside the time scope of the warrant and shall not be disclosed.

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SMS MESSAGES.

Defendant's position: The warrant did list/ request SMS messages. It's the defense's position that the state is entitled to all SMS messages in October of 2014, messages 1 -662 on pages 1-75 of the extraction report. Any messages thereafter are time-barred by the warrant.

In addition, the following messages are attorney-client communications that should not be disclosed to the state: 190-195, 197-198, 203-214, 217, 219, 220, 223, 225-226, 230-234, 236, 526-528, 608-609, 672-683, 995-960, 1021-1023, 1032-1035, 1118-1120, 1136-1140

THE COURT'S RULING: Messages 190-195, 197-198, 203-214, 217, 219, 220, 223, 225-226, 230-234, 236, 526-528, 608-609, 672-683, 995-960, 1021-1023, 1032-1035, 1118-1120, 1136-1140 are protected from disclosure by the attorney-client privilege and shall not be disclosed. The remaining messages on pages 1-75 shall be disclosed to the state; all entries on pages 76-136 are outside the time scope of the warrant and shall not be disclosed.

USER ACCOUNTS.

Defendant's position: The warrant did not list any user account information. The attached does not have any date/time they were created; therefore, the defense objects to the state receiving this information.

THE COURT'S RULING: The warrant authorized seizure of "any account information , settings, and saved usage information for any and all installed applications..." The Court finds that the information contained in the "User Accounts" section is covered by this authorization. Therefore, the following portions shall be disclosed to the state: pages 1-5.

WEB BOOKMARKS.

Defendant's position: Although the warrants does list/request web bookmarks, the attached are all from 2013; therefore the defense objects to the state receiving this information as it is outside the time scope of the warrant.

THE COURT'S RULING: The Court finds that web bookmarks existing on the phone in October 2014 are discoverable. All entries in this section were created in 2013 are were not deleted. Therefore, the following portions shall be disclosed to the state: page 1.

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WEB HISTORY.

Defendant's position: The warrant includes web history. The state is entitled to web searches 1-1162, pages 1-66 of the extraction report relating to web searches from October of 2014. All others are time-barred by the warrant.

THE COURT'S RULING: Pages 1-66 (items 1-1162) shall be disclosed to the state; all other entries are outside the time scope of the warrant and shall not be disclosed.

WIRELESS NETWORK.

Defendant's position: The warrant includes a request for information re: wireless networks. Although there is no date/time stamp re: these networks in the attached, the defense does not object to the state obtaining this information.

THE COURT'S RULING: Page 1 (items 1-2) shall be disclosed to the state.

DATA FILES: DOCUMENTS.

Defendant's position: The warrant does ask for data files, but not documents. The defense's position is that the state is entitled to no disclosure from this extraction report. If this court disagrees, the defense proposes that only those documents created in October of 2014 be disclosed to the State: 1, 3, 9, 10, 12 and 13.

THE COURT'S RULING: The warrant authorized seizure of "data stored or maintained on any phone accessory such as a memory card". The Court finds that the information contained in the "Documents" section is covered by this authorization. Therefore, the following portions shall be disclosed to the state: Items 1, 3, 9, 10, 12 and 13; all other entries are outside the time scope of the warrant and shall not be disclosed.

DATA FILES: IMAGES.

Defendant's position: The warrant does ask for data and photos. The defense's position is that the state is entitled all images/photos created in October 2014. Any other photos should not be disclosed pursuant to the time scope of the warrant. This is going to be difficult as the images are interspersed throughout and not organized by date/created.

THE COURT'S RULING: The Court finds that all Image Files created in October 2014 are discoverable. Defendant shall disclose all pages (1-322) in this section but is authorized to redact entries not created in October 2014.

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TIMELINE.

Defendant's position: This extraction is basically all of the web downloads, SMS, MMS, instant messages, phone calls as they occurred in time. The defense believes the state is entitled to items beginning on p. 260 items 7551-11538 on p. 429; however, there are some attorney client communications in there at items 8084-8086, 9019-9021, 10528, 10530-10534, 10539-10540, 10542, 10545-10546, 10548, 10551-10562, 10580-10581, 10583-10590, 11473

THE COURT'S RULING: Items 8084-8086, 9019-9021, 10528, 10530-10534, 10539-10540, 10542, 10545-10546, 10548, 10551-10562, 10580-10581, 10583-10590, 11473 are protected from disclosure by the attorney-client privilege and shall not be disclosed. The remaining items on pages 260 (beginning at item 7551) through page 429 shall be disclosed to the state; all entries on pages 1-260 (through item 7550) are outside the time scope of the warrant and shall not be disclosed.

As to all portions herein ordered to be disclosed by Defendant,

IT IS ORDERED that said materials be disclosed not later than **JULY 15, 2016**.

IT IS FURTHER ORDERED affirming the **Capital Case Management Conference** date of **JUNE 21, 2016 at 8:30 a.m.** before the HON. M. SCOTT McCOY.

IT IS FURTHER ORDERED affirming the **Final Trial Management Conference** date of **APRIL 24, 2017 at 8:30 a.m.** before the HON. M. SCOTT McCOY.

IT IS FURTHER ORDERED affirming the **TRIAL** date of **MAY 25, 2017 at 9:30 a.m.** before the HON. M. SCOTT McCOY.

LAST DAY REMAINS: 6/26/2017

IT IS FURTHER ORDERED exhibits 1 and 2, filed under seal; shall not be unsealed absent further Order of the Court.

FILED: Exhibit Worksheet